No. 78-1021

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES A. ALFANO,

Petitioner,

vs.

THE ILLINOIS JUDICIAL INQUIRY BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petition for Certiorari

Petitioner, Charles A. Alfano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in these proceedings on July 14, 1978.

Opinions Below

The opinion of the Illinois Supreme Court, which is published at 72 Ill.2d 225, 380 N.E.2d 801 and was filed July 14, 1978, appears in the Appendix hereto, at App. 1. The letter from the Clerk of the Supreme Court, inform-

ing petitioner that the Illinois Supreme Court denied his petition for rehearing on September 29, 1978, appears in the Appendix at App. 27. The order of the Circuit Court of Lake County, Illinois, entered December 14, 1977, appears in the Appendix at App. 28. The memorandum opinion of the Circuit Court, dated December 14, 1977, appears in the Appendix at App. 30.

Jurisdiction

The judgment of the Illinois Supreme Court was entered on July 14, 1978. A timely petition for rehearing was denied September 29, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether a criminal defendant charged with a misdemeanor offense has the same Fourteenth Amendment right to favorable evidence under this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), as a defendant charged with a felony offense.

2. Whether a state court judge who is simultaneously the target of a criminal complaint and an investigation by the Judicial Inquiry Board is entitled under the Fourteenth Amendment to the United States Constitution to have relevant and favorable evidence in the possession of the Judicial Inquiry Board produced so that the judge may use it in his defense against the criminal charge.

3. Whether a criminal defendant is denied his right to due process of law under the Fourteenth Amendment to the United States Constitution when a determination by the Judicial Inquiry Board not to produce relevant and favorable evidence in its possession is final and not subject to *in camera* review by the trial court.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Constitution, Article VI, Section 15(c):

> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be con-

fidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

Statement of the Case

On September 5, 1977, petitioner's son was arrested for driving a motorbike in a private subdivision without a license. Subsequent to the arrest of his son, petitioner, Judge Charles A. Alfano, was arrested by an officer of the Lake County, Illinois, Sheriff's Department and charged with battery and obstructing a police officer from performing his duties. The charges against petitioner's son were dismissed. However, the charges against petitioner are presently pending before the Circuit Court of Lake County, Illinois, in *People* v. *Charles Alfano,* No. 77 M 9422. It is alleged that petitioner struck a police officer on the arm.

After petitioner's arrest, the Illinois Judicial Inquiry Board (the "Board") began an investigation of the incident to determine whether charges shall be brought before the Illinois Courts Commission. In the course of its investigation, the Board took statements from numerous witnesses and heard *ex parte* sworn testimony from the complaining officer.

In the course of preparing for trial on the criminal charges, petitioner was informed that a member of the Board's staff had stated that many of the witnesses who were interviewed by the Board, including persons named in the State's list of witnesses, made contradictory statements regarding the events of September 5, 1977.

In November 1977, petitioner moved the trial court in *People* v. *Alfano, supra,* to order the State to produce relevant and favorable evidence in the possession of the Judicial Inquiry Board. Simultaneously, a subpoena duces tecum was served upon the Board for these same materials.

Thereafter, the Board moved to quash the subpoena on the grounds that the court lacked jurisdiction to compel the production of Board documents and that the requested material was subject to an absolute rule of non-disclosure. After receiving briefs and affidavits and hearing oral argument, the trial court denied the motion to quash and ordered production of relevant and favorable evidence. The Court held that the term "confidential" as used in the Illinois Constitution, Article VI, Section 15(c), does not mean privileged. Further, the Court ruled that if "confidential" were to be construed as privileged, then that portion of the Illinois Constitution is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution. Specifically, the trial court ordered:

1. That the Board produce at the time of trial statements made by any person on the state's list of witnesses and that the statements of any witness who testifies at trial shall be made available to the defense upon the conclusion of the witness's direct testimony; and

2. That the Board produce for inspection by the court, all evidence obtained by the Board in its investigation so the court could examine the evidence and, excluding work product and the identity of any confidential informant, deliver any exculpatory evidence to petitioner.

Thereafter, the Board petitioned the Illinois Supreme Court for the issuance of writs of mandamus and prohibition against the trial court.

On July 14, 1978, the Illinois Supreme Court awarded the writ of mandamus and directed the trial court to vacate its December 14 production order. *People ex rel. The Illinois Judicial Inquiry Board* v. *Hartel,* 72 Ill.2d 225, 380 N.E.2d 801 (1978). There was no majority opinion of the Illinois Supreme Court. The plurality opinion was de-

livered by Mr. Justice Underwood, joined by Mr. Justice Ryan and Mr. Justice Kluczynski. These three justices held that the Board need disclose only material which in the Board's opinion "on its face plainly negates defendant's guilt." (72 Ill. 2d at 238). Mr. Justice Clark concurred to form a majority but espoused a disclosure standard different from the plurality's. (72 Ill.2d at 241). Mr. Chief Justice Ward and Mr. Justice Moran each specially concurred, agreeing that a production order should issue for all "favorable" evidence but differing from the trial court and from one another as to its terms. Mr. Chief Justice Ward stated that in his opinion, the opinion of the plurality was patently unconstitutional. (72 Ill. 2d at 242). Mr. Justice Goldenhersh took no part in the consideration or decision of the case.

On September 29, 1978, petitioner's timely petition for rehearing was denied. Thereafter, and within 90 days, petitioner applied to this Court for a writ of certiorari.

Reasons for Granting the Writ

I.

THE ILLINOIS SUPREME COURT'S UNPRECEDENTED INTERPRETATION OF BRADY v. MARYLAND HAS FAR REACHING CONSEQUENCES.

Petitioner seeks review in the United States Supreme Court of the unprecedented interpretation which the Illinois Supreme Court has given to this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The Illinois Supreme Court held that under *Brady* petitioner is not entitled to all favorable evidence, but only to evidence which "on its face, plainly negates guilt." (72 Ill. 2d at 238). The Illinois court sought to justify this holding by noting that petitioner is charged only with misdemeanor offenses and cites *People* v. *Schmidt*, 56 Ill.2d 572, 309 N.E.2d 557 (1974), where it said in dicta: "The State is required to furnish defendants in misdemeanor cases with . . . evidence negating the defendant's guilt (*Brady* v. *Maryland*, 373 U.S. 83)." The decision of the Illinois Supreme Court seriously undermines the basic requirements of a fair trial articulated by this Court in *Brady* and in *Gigilo* v. *United States*, 405 U.S. 150 (1972). (See Section II, *infra*). The Chief Justice of the Illinois Supreme Court, specially concurring, stated the problem with the plurality opinion succinctly (72 Ill. 2d at 242):

> This disclosure standard of plainly negating guilt is of course completely arbitrary and without precedent in any jurisdiction. I consider it to be offensive to the Federal command of due process and fair trial and of course to the commands of our constitution as well.

In diminishing petitioner's right to favorable evidence under *Brady* and *Giglio*, the Illinois Supreme Court relied in part on what it perceived as the competing confidentiality interest of the Judicial Inquiry Board. This aspect of the Court's decision also has wide ranging and grave ramifications. Forty-seven states, the District of Columbia and Puerto Rico have established by constitution, statute or court rule some type of judicial inquiry and disciplinary procedures. Several bills are also pending in Congress providing for inquiry into the conduct of federal judges. See, *e.g.* H.R. 1850, 95th Cong., 1st Sess. (1977); H.R. 9042, 95th Cong., 1st Sess. (1977); S. 1423. 95th Cong., 1st Sess. (1977). With the exception of Puerto Rico, all of these jurisdictions provide for the confidentiality of judicial disciplinary proceedings comparable to those in question here. See *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 834 (1978).

The issues presented in this case will almost certainly arise in other states and again in Illinois whenever a judge under investigation by a judicial inquiry commission is simultaneously the subject of a criminal prosecution. At issue are fundamental rights guaranteed by the federal constitution; namely, the right to compulsory process for witnesses and the right to disclosure of favorable evidence. A determination by this Court of the constitutional questions presented here is essential to the vindication of these constitutional guarantees.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT DENIES PETITIONER HIS RIGHT TO A FAIR TRIAL.

In *United States* v. *Nixon*, 418 U.S. 683, 711 (1974), this Court stated:

> The right to the production of all evidence at a criminal trial . . . has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In *Nixon*, this Court held that the *prosecutor's* interest in obtaining relevant evidence prevailed over the president's generalized interest in confidentiality. Similarly, a criminal defendant's Sixth and Fourteenth Amendment right to compulsory process prevails over the confidentiality granted a news reporter's notes by state law. *In re Farber*, ... N.J. ..... (Sept. 21, 1978), *cert. denied*, ... U.S. ..... (Nov. 28, 1978). In the case at bar, the Illinois Supreme Court, taking the opposite position, held that the Board's generalized interest in confidentiality prevails over a criminal defendant's interest in obtaining relevant and favorable evidence.

It is a principle of long-standing that a criminal defendant is entitled to every person's evidence. *United States* v. *Burr*, 25 F.Cas. 187, 190-92 (No. 14,694) (C.C. Va. 1807). In the instant case, petitioner's interest in evidence in the Board's possession is accentuated by the fact that some of this evidence is exculpatory.

The minimum due process requirements for disclosure of favorable evidence to a defendant in a criminal trial were first articulated by this Court in *Brady* v. *Maryland* (373 U.S. at 87):

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution.

In *Giglio* v. *United States*, this Court held that information which might undermine the credibility of an adverse witness must also be disclosed under *Brady*. This Court stated (405 U.S. at 154):

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.

The Board has never contested that it has in its possession "favorable" material as defined in *Brady* and *Giglio*. The Board took a sworn statement from the complaining witness regarding the incident at issue in the criminal trial. Further, petitioner is informed that the Board has conflicting statements from other witnesses, some of whom have refused to speak with petitioner's investigator.[1] Yet, under the plurality decision of the Illinois Supreme Court, the Board is excused from producing any evidence except that which in the Board's opinion "on its face plainly negates defendant's guilt." (72 Ill.2d at 238). The Illinois

[1] Given the secrecy which surrounds Board proceedings, it is hardly surprising that petitioner's information is generalized and based on hearsay. Any greater showing of specific material in the Board's possession would be impossible in cases such as this. See, *In re Farber*, ... N.J. ..... (Sept. 21, 1978), *cert. denied*, ... U.S. ..... (Nov. 28, 1978).

Supreme Court thus severely dilutes the requirements of *Brady* and *Giglio* and denigrates petitioner's right to a fair trial.

The standard established in *Brady* and *Giglio* should not vary in the instant case simply because a government entity other than the prosecutor's office is in possession of the favorable evidence. See *United States* v. *Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973); *United States* v. *Bryant*, 439 F. 2d 642, 650 (D.C. Cir. 1971). Indeed, the Illinois Supreme Court acknowledged that *Brady* applies to this case. (72 Ill. 2d at 238).

On the ground that petitioner is charged only with a misdemeanor offense, however, the Court failed to apply the *Brady* principle properly. (72 Ill.2d at 234). This rule is directly contrary to the plain language of *Brady* and the cases construing it. Neither this Court nor any other of which petitioner is aware has ever suggested that a criminal defendant's right to favorable evidence is diminished in misdemeanor cases.

The Illinois Supereme Court used the Board's generalized interest in confidentiality, set forth in Article VI, Section 15(c) of the Illinois Constitution, as an additional reason for diluting the *Brady* requirements. (72 Ill. 2d at 230). Under the plurality opinion, petitioner's right to favorable evidence is virtually eliminated. Yet the State's interest in maintaining the confidentiality of certain information or proceedings is necessarily limited by the constitutional guarantee of a fair trial. See e.g. *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957) (informer's privilege must give way to right to fair trial); *Davis* v. *Alaska*, 415 U.S. 308, 319-20 (1974) (right of confrontation is paramount to confidentiality of juvenile record). As Chief Justice Ward said, "The requirement of fair trial is not to be frustrated by either a rule of court or by a constitution."

(72 Ill. 2d at 243). Further, diluting petitioner's right to favorable evidence was not necessary to preserve the Board's legitimate confidentiality interests. *In camera* review of materials by the trial court to determine what, if any, materials need be disclosed would "accommodate the confidentiality requirement to the fullest, while, simultaneously, effectuating defendant's right to a fair criminal trial." (72 Ill.2d at 247-48) (Moran, J., specially concurring).

The plurality opinion attempts to soften its blow to petitioner's right to a fair trial by noting that the prosecutor has no greater access to the material in the Board's possession than does petitioner. (72 Ill. 2d at 235-36). The Illinois court thus resurrects the "sporting theory of justice" by which a trial is fair so long as the sides are even and the rules are observed, regardless of whether the search for truth is advanced. See, Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash. U.L.Q. 279 (1963).

None of the considerations raised by the plurality justifies the diminution of petitioner's fundamental right to fair trial that occurred in this case. Petitioner's right to due process of law may not be balanced away, nor may the principles of due process established in *Brady* and *Giglio* be undermined simply because these are misdemeanor proceedings.

The decision of the Illinois Supreme Court cannot be reconciled with prior decisions of this Court. It denies petitioner that fundamental fairness which the Fourteenth Amendment to the United States Constitution guarantees. For these reasons, a writ of certiorari should issue to review the judgment of the Illinois Supreme Court.

III.

THE DECISION OF THE ILLINOIS SUPREME COURT DENIES PETITIONER HIS RIGHT TO A JUDICIAL DETERMINATION OF HIS CONSTITUTIONAL CLAIM.

Even assuming, *arguendo,* that the Illinois Supreme Court's interpretation of *Brady* is correct in requiring only material which "plainly negates guilt" to be produced, petitioner is nonetheless denied his fundamental right to due process of law, because the Illinois Supreme Court makes the Board itself the sole and final determiner of that issue. The Illinois Supreme Court specifically refused to permit *in camera* review by the trial court to ascertain whether the constitutional standard is properly applied or whether the Board exceeds its authority in withholding materials.[2]

This Court has held that when an apparent issue of fact, "necessarily implicates an issue of constitutional law," it should be reviewed anew at each stage of judicial proceedings. *Jacobellis* v. *Ohio,* 378 U.S. 184, 187-88 (1964). Thus, this Court has consistently engaged in *de novo* review of the facts in cases where, as here, the facts are inextricably interwoven with issues of constitutional law. *See e.g. Jacobellis, supra* (obscenity); *Haynes* v. *Washington,* 373 U.S. 503, 515-16 (1963) (voluntary confession); *Napue* v. *Illinois,* 360 U.S. 264, 271-72 (1959) (effect of false testimony in a criminal trial); *Norris* v. *Alabama,*

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[2] The plurality failed to articulate any rationale for this holding; however, they seemed concerned that a judge should not review materials in the possession of the Board which is investigating another judge. This sort of reasoning casts doubt on the integrity of our judiciary and is without basis in fact or logic. There is no suggestion that the trial court in this case had a special interest in the defendant, nor were there any special circumstances which raised the spectre of bias or conflict of interest.

294 U.S. 587, 589-90 (1935) (jury discrimination); *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927) (validity of state syndicalism statute as applied). Under the rule adopted by the Illinois Supreme Court, neither this Court nor any other would be able to review a Board determination that disclosure of evidence is not constitutionally required.

In *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 842-43 (1978) this Court held that the courts must independently inquire whether the publication of information regarding confidential proceedings before a judicial inquiry commission constitutes a clear and present danger to the integrity of the proceedings. The need for independent judicial review is even more compelling here than in *Landmark Communications*, because it is the Board's own claim of confidentiality which competes with petitioner's right to disclosure. The decision of the Illinois Supreme Court denying *in camera* review makes petitioner's exercise of his constitutional right to favorable evidence depend on the unreviewable discretion of administrative officers who have an interest in protecting their own investigation. The Board's interest in protecting its own investigation is inconsistent with its role in determining whether petitioner is entitled to exculpatory evidence.

It is the unique province and duty of the courts "to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803); See also, *People ex rel. Harrod* v. *The Illinois Courts Commission*, 69 Ill. 2d 445, 457-58, 372 N.E. 2d 53, 58-59 (1977). In this case, a determination of "what the law is" necessarily includes review of the Board's decision, if only to determine whether the Board exceeded its authority. As stated by this Court in *Baker* v. *Carr*, 369 U.S. 186, 211 (1962).

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

In *People ex rel. Harrod* v. *The Illinois Courts Commission, supra*, the Illinois Supreme Court unanimously rejected the contention that it lacked jurisdiction to review a decision of the Illinois Courts Commission. The Court stated (372 N.E. 2d at 58):

> To suggest that only the Commission can interpret and determine the scope of its own authority is to imply that this court is without the power to determine whether the constitution's grants of or limitations of authority have been exceeded. Such an implication must be totally rejected.

The decision of the Illinois Supreme Court, denying petitioner a judicial determination of his claim for production in this case is without precedent. When materials are withheld on grounds of attorney-client privilege, the court may command production *in camera* to determine whether the privilege applies. See *United States* v. *Osborn*, 561 F.2d 1334, 1337-39, (9th Cir. 1977). See also, *First Wisconsin Mortgage Trust* v. *First Wisconsin Corp.*, 584 F.2d 201, 209 (7th Cir. 1978) (en banc). The same is true when the informer's privilege, *United States* v. *Hurse*, 453 F.2d 128, 130-31 (8th Cir. 1971), or the news reporter's privilege is invoked. *In re Farber*, ... N.J. ....., (Sept. 21, 1978), *cert. denied*, ... U.S. ..... (Nov. 28, 1978). This Court has upheld the right to *in camera* review even against a claim of executive privilege. *United States* v. *Nixon*, 418 U.S. 683, 703-705 (1974). Under the Freedom of Information Act, even materials which have been designated secret in the interest of national defense or foreign policy are

subject to *in camera* review so the court may determine whether they have been properly designated. 5 U.S.C. §552(a)(4)(B). When a prosecutor determines that evidence need not be produced under *Brady*, a criminal defendant may invoke the court's power to review materials *in camera* and reach an independent determination. See *Williams* v. *Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969), vacated on other grounds *sub nom. Williams* v. *Smith*, 408 U.S. 938 (1971); *United States* v. *Eley*, 335 F.Supp. 353, 356-57 (N.D. Ga. 1972).

The need for a judicial determination of what materials must be disclosed is underscored in this case by the fact that it is the trial court, not the Board, which possesses the information and expertise that will enable a fair resolution of the issues. *Cf. McKart* v. *United States*, 395 U.S. 185, 197-98 (1969) (Further administrative proceedings are unnecessary when the issue is solely one of statutory interpretation, which requires no particular expertise.) The Board may know nothing whatsoever of the facts of the criminal case. It can hardly then determine what materials plainly negate guilt.

Even more troubling is the Board's lack of knowledge of the legal context. Four of the Board's nine members are nonlawyers. Ill. Const. Art. 6 §15(b). The Board is charged with the responsibility for determining whether respondent's conduct is prejudicial to the administration of justice or brings the judicial office into disrepute. The criminal court, on the other hand, has the responsibility for determining petitioner's guilt or innocence on a specific criminal charge. Yet it is the Board which makes the final determination of delicate constitutional and legal questions. Such close questions as whether a statement by a witness is inconsistent in whole or in part with his testimony at trial

cannot be determined by the Board in advance of trial, particularly by a Board composed of such a large number of non-lawyers.

In camera review by the trial court of allegedly relevant and favorable evidence is essential to the implementation of petitioner's right to favorable evidence, even under the standard adopted by the Illinois Supreme Court. Certiorari should be granted to determine whether the Illinois Supreme Court erred in holding that *in camera* review of materials in the possession of the Judicial Inquiry Board is not permissible.

Conclusion

For all of the reasons stated herein, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court.

Respectfully submitted,

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Dated: December 22, 1978

APPENDIX

APPENDIX

(No. 50286.—Writ awarded.)

THE PEOPLE *ex rel.* THE ILLINOIS JUDICIAL INQUIRY BOARD *et al.*, Petitioners v. HARRY D. HARTEL, JR., Judge, *et al.*, Respondents.

Opinion filed July 14, 1978.—Rehearing denied September 29, 1978.

1. COURTS—*a trial court order commanding broad disclosure of Judicial Inquiry Board files to the court for inspection in a misdemeanor prosecution of a judge is properly vacated.* Where a judge has been charged with misdemeanor violations and has sought the production of the files of the Judicial Inquiry Board concerning him, for either his own inspection or the trial court's *in camera* inspection for material exculpatory to him, and where a subpoena has been served on the chairman of the Board ordering him to appear and produce the "investigative file" on the defendant judge, including the "reports of all witnesses interviewed," and where the trial court has entered an order denying a motion to quash the subpoena and directing the Board to produce, at the time of trial, all substantially verbatim statements made by any person named on the State's witness list, to make available to defendant at the conclusion of any witnesses' direct trial testimony the statements of that witness, and to produce for the court's inspection all evidence obtained by the Board during its investigation for the court's delivery to

the defendant judge of any evidence that "tends to negate the defendant's guilt or which is of an exculpatory nature," the order is promptly vacated, since a confidentiality surrounds Judicial Inquiry Board proceedings by reason of section 15 of article VI of the 1970 Illinois Constitution, and since due process does not require such broad disclosure as is provided for in the order. (Pp. 227-242.)

2. MANDAMUS—*the supreme court may properly issue a writ of mandamus compelling a judge in a criminal case to vacate an overly broad discovery order directed toward the Judicial Inquiry Board.* Where a trial judge has entered an order denying a motion to quash a subpoena for the "investigative file" of the Judicial Inquiry Board pertaining to a judge who has been charged with misdemeanor violations, and has in the same order directed the Board to produce more of its files than would be required by due process or permitted by the Illinois Constitution (Ill. Const. 1970, art. VI, sec. 15), it is proper for the supreme court, in an original action brought by the Judicial Inquiry Board, to order the issuance of a writ of *mandamus* to vacate the trial court's order. (Pp. 227-242.)

CLARK, J., concurring.

GOLDENHERSH, J., took no part.

WARD, C.J., and MORAN, J., specially concurring.

Original petition for *mandamus* or prohibition.

Milton I. Shadur, Michael L. Shakman, and James A. Carney, of Chicago (Devoe, Shadur & Krupp, of counsel), for petitioners.

Charles J. O'Laughlin, Michael J. Rovell, Kathleen J. Purcell, and Steven B. Berlin, of Chicago (Jenner & Block, of counsel), for respondent Charles A. Alfano.

MR. JUSTICE UNDERWOOD delivered the decision of the court and the following opinion in which MR. JUSTICE RYAN and MR. JUSTICE KLUCZYNSKI join:

Pursuant to our Rule 381 (58 Ill. 2d R. 381) we allowed the Judicial Inquiry Board leave to file an original petition for *mandamus* or prohibition. That petition seeks to compel Judge Harry D. Hartel, Jr., of the Lake County circuit court to vacate his order commanding the Board to produce the fruits of its investigation of the conduct of Judge Charles A. Alfano (defendant). The petition also seeks to prohibit any future attempts to compel disclosure of the Board's actions regarding Judge Alfano or the results thereof.

Charles Alfano is an associate judge of the circuit court of Cook County. On September 5, 1977, he was arrested by Officer Whitmore of the Lake County sheriff's department and charged with battery and obstructing a police officer from performing his duties, both misdemeanor offenses. Those charges are presently pending before the circuit court of Lake County in a case entitled People v. Charles Alfano. After his arrest, the Judicial Inquiry Board began an investigation to determine whether the incidents giving rise to that arrest constituted a basis for the filing of a complaint before the Courts Commission. That action was independent of any other investigation by the State's Attorney or police. In the course of that investigation, which is still pending, the Board has obtained certain statements and documents relevant to the incident. One person has testified before the Board while under oath. The Board has not disclosed any information to the State's Attorney, and its chairman states in an affidavit that the Board will not make any future disclosure to that

office. In November defendant moved the trial court to order "that the files of the Judicial Inquiry Board be produced for defendant's inspection or, in the alternative, that they be produced for inspection by this Court in camera and those portions thereof which contain material exculpatory to defendant be produced for defendant's inspection." He alleged as grounds for his motion that:

> "1. The Judicial Inquiry Board has conducted an extensive investigation into this case. The investigator for the Judicial Inquiry Board has interrogated substantially all of the witnesses including several who have refused to submit to interrogation by this defendant.
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> 2. The investigator for the Judicial Inquiry Board has from time to time revealed to witnesses friendly to defendant the substance of what other witnesses have stated. In certain instances statements exculpatory to defendant have been revealed. In other instances statements of what occurred which are at variance with prior statements of witnesses adverse to defendant have been revealed."

Simultaneously, a *subpoena duces tecum* was served on the Board's chairman ordering him to appear and produce the "investigative file in the matter of Charles A. Alfano, including reports of all witnesses interviewed."

Following a hearing on defendant's motion to produce the Board's file and the Board's motion to quash the *subpoena duces tecum,* an order was entered by Judge Hartel on December 14, 1977, denying the motion to quash and directing the Board to produce at the time of trial all substantially verbatim statements made by any person

named on the State's list of witnesses in the criminal proceeding, to make available to defendant at the conclusion of any witnesses' direct trial testimony the statements of that witness, and, in addition, to produce within 14 days for the court's inspection all evidence obtained by the Board during its investigation, the court to deliver to respondent any evidence which "tends to negate the defendant's guilt or which is of an exculpatory nature." It is that order vacation of which is sought in this action.

The Judicial Inquiry Board was created by Article VI, section 15(b), of the Illinois Constitution. It is an integral part of Illinois' system of judicial discipline. Under section 15(c) the Board is authorized to conduct investigations, to receive or to initiate complaints concerning a judge, and to file with the Courts Commission complaints in those cases in which the Board has determined that a reasonable basis exists to charge a judge with misconduct or disability. The Courts Commission, established by section 15(e), hears complaints filed by the Board and determines the discipline, if any, to be imposed. That discipline may include removal of the judge from office. Of particular importance here is the provision in section 15(c) that "[*a*]*ll* proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission." (Emphasis added.) Ill. Const. 1970, art. VI, sec. 15(c).

The Board urges that the confidentiality provision of section 15(c) precludes the disclosure ordered by the trial court; that such disclosure would unconstitutionally impede the Board's performance of its duties; that because the material required to be disclosed has not been disclosed to the prosecution and is unavailable to it, the due process principles relied upon by the trial judge are inapplicable; and that, assuming judicially compelled pro-

duction would be appropriate in some circumstances, that production would require the showing of a compelling and particularized need which has not been demonstrated here.

In contrast to the Board's contention that its confidentiality is absolute, Judge Alfano contends the principle reason for the confidentiality provision of 15(c) was the protection of judges against unfavorable publicity resulting from irresponsible and unfounded charges or complaints, and that, since it is he who is requesting disclosure, the need for confidentiality is substantially diminished. It is clear that protection of judges from such charges and complaints was an important consideration in the adoption of the confidentiality provision by the Constitutional Convention. (6 Record of Proceedings, Sixth Illinois Constitutional Convention 867.) Other elements, including the encouragement and protection of witnesses, must also be evaluated however, and we cannot conclude, simply because the judge under investigation consents to disclosure, that the Board's files may automatically be opened to inspection. See *In re Mikesell* (1976), 396 Mich. 517, 534, 243 N.W.2d 86, 94; *McCartney* v. *Commission on Judicial Qualifications* (1974), 12 Cal. 3d 512, 520-21, 526 P.2d 268, 274, 116 Cal. Rptr. 260, 266.

By no means the least of the factors requiring consideration is the fact that the confidentiality which we are asked to breach here is not of the ordinary common law or statutorily provided variety. It is an expressly stated mandate of our constitution that "*All proceedings* of the Board *shall be confidential* * * *." (Emphasis added.) Its intent is unmistakable, it is impervious to legislative or judicial change, and it must be implemented except as overriding Federal due process requirements compel us to do otherwise.

The Board argues that if we conclude some form of judicially compelled disclosure is permissible, the prerequisites thereto are akin to those in situations where disclosure of the identities of government "informers" is sought or where production of transcripts of the testimony of witnesses before a grand jury is requested, and that those prerequisites have not been met here. Neither of those privileges is constitutionally based, and, of course, neither is absolute. The informer's privilege must yield to the requirements of a fair trial. (*Roviaro* v. *United States* (1957), 353 U.S. 55, 1 L. Ed. 2d 639, 77 S. Ct. 623; *People* v. *Lewis* (1974), 57 Ill. 2d 232), and the "indispensable secrecy of grand jury proceedings" referred to in *United States* v. *Johnson,* (1943), 319 U.S. 503, 513, 87 L. Ed. 1546, 1555, 63 S. Ct. 1233, 1238, has suffered increasing diminution in the Federal courts. While the Supreme Court in *United States* v. *Procter & Gamble Co.* (1958), 356 U.S. 677, 2 L. Ed. 2d 1077, 78 S. Ct. 983, and *Pittsburgh Plate Glass Co.* v. *United States* (1959), 360 U.S. 395, 3 L. Ed. 2d 1323, 79 S.Ct. 1237, acknowledged the existence of instances when a particularized showing of a compelling necessity would require piercing the veil of grand jury secrecy, the policies against disclosure were generally reaffirmed. The showing of the compelling and particularized need required by *Procter & Gamble* and *Pittsburgh Plate Glass* was held to have been satisfied by government concessions and the peculiar facts in the later case of *Dennis* v. *United States* (1966), 384 U.S. 855, 16 L. Ed. 2d 973, 86 S. Ct. 1840, but the suggestion in that opinion of a more liberalized approach to disclosure questions has prompted a dichotomy in the lower Federal court decisions on similar questions. That divergence is typified, perhaps, by *Bast* v. *United States* (4th Cir. 1976), 542 F.2d

893, emphasizing that where it is necessary to breach the secrecy of grand jury proceedings, it should be done "discreetly and limitedly" and only upon a showing of a particularized need, and *Harris* v. *United States* (D.C. Cir. 1970), 433 F.2d 1127, holding that a defendant is automatically entitled to relevant grand jury testimony of a witness who testifies at trial. We note, however, that even the cases ordering production of privileged material have not done so in the course of an ongoing, uncompleted investigation by a governmental agency as in the case before us. (*In re Bonanno* (2d Cir. 1965), 344 F.2d 830, 834.) In fact, the Federal courts generally refuse to allow pretrial inspection of grand jury minutes simply for the purpose of preparing for trial. Annot., *Accused's Right to Inspection of Minutes of Federal Grand Jury*, 3 A.L.R. Fed. 29, 63 (1970).

Some of the reasons for secrecy in grand jury proceedings, in Judicial Inquiry Board proceedings and in concealing the identities of government informers are similar, but there are additional factors militating against disclosure of Board affairs. The Supreme Court in its recent opinion *Landmark Communications, Inc.* v. *Virginia* (1978), ... U.S. ....., 56 L. Ed 2d 1, 98 S. Ct. 1535, recognized that confidentiality was uniformly regarded as an important factor in the effective operation of State judicial disciplinary commissions in that it encouraged "the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination," protected judges "from the injury which might result from publication of unexamined and unwarranted complaints," maintained confidence in the judiciary by avoiding publicity regarding groundless claims of judicial misconduct made by disgruntled litigants, facilitated the commission's work

by encouraging the "voluntary" resignation or retirement of judges as to whom complaints justifying removal were under consideration since their resignation or retirement would avoid the publicity attendant upon a formal charge or hearing, and made possible the adjustment of minor complaints which might appropriately be called to the judge's attention without publicity. Other than as it generally confirms the value of the confidentiality bestowed upon commission proceedings, that opinion is not particularly relevant to the issue here, however, for it held only that the first amendment did not permit the criminal punishment of a third party (a newspaper owner) who is a stranger to proceedings before a judicial review commission for publishing truthful information regarding confidential proceedings of that commission.

Other cases concerning judicial disciplinary proceedings also emphasize the need for confidentiality. In reconciling potentially conflicting provisions of its State constitution, the Supreme Court of Florida observed in *Forbes* v. *Earle* (Fla. 1974), 298 So. 2d 1, 4:

> "The purpose [of its judicial qualifications commission] is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges. Confidentiality is also necessary for the Commission to carry out its responsibility to make suitable recommendations concerning judicial personnel problems that affect court efficiency. Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system."

Similarly, the Supreme Court of Michigan recently stated:

> "In *In the Matter of Mikesell*, 396 Mich. 517, 534, 243 N.W.2d 86, 94 (1976), this Court addressed the policy reasons for limiting disclosure and discovery in judicial fitness proceedings:
>
> > '[T]he confidentiality provisions * * * protect witnesses and citizen complaints. If the respondent and others similarly situated were allowed to discover the name of every complainant, including those who will not appear and those whose complaints have been dismissed, the free flow of information to the Commission would be curtailed. The Commission carefully investigates all complaints and this Court would not want to discourage citizen complainants from voicing their ideas.' " *In re Del Rio* (1977), 400 Mich. 665, 686-87, 256 N.W.2d 727, 735; see also *McCartney* v. *Commission on Judicial Qualifications* (1974), 12 Cal. 3d 512, 520-21, 526 P.2d 268, 274, 116 Cal. Rptr. 260, 266.

The case before us differs, of course, from those we have cited. It is not the typical one of a criminal defendant seeking production of evidence in the hands of the prosecuting attorney or an agency within his control. We note that even if that were the case here, Judge Alfano, charged only with misdemeanor offenses, would not be entitled as of right to the discovery provided by our criminal discovery rules which apply only to offenses punishable by imprisonment in the penitentiary. (58 Ill.2d R. 411, 412; *People* v. *Schmidt* (1974), 56 Ill. 2d 572.) It would indeed be anomalous if in these circumstances, where the crimes

with which defendant is charged are not sufficiently serious to entitle him to discover evidence in the possession of his adversary, he could force disclosure of constitutionally privileged evidence in the hands of a third party.

Nor is this case like the judicial disciplinary cases earlier referred to in which the respondent judge seeks production from the charging body. Here no complaint has been filed with the Courts Commission by the Board, nor is it certain that one ever will be filed. Rather, the judge is defending himself in the circuit court, against criminal charges—misdemeanors—and may obtain, we are told, as a result of an agreement with the prosecutor, all of the liberal discovery which our rules provide for those charged with felonies. Additionally, however, he seeks in the proceedings before us to compel the Judicial Inquiry Board—an independent, autonomous body created by a constitution which classifies its proceedings as confidential—to interrupt its ongoing investigation of his conduct and deliver to him, or to the circuit court for its *in camera* inspection, the material gathered by the Board in the course of that investigation. Production is sought on the basis of his assertion, apparently unsupported by testimony or affidavit, that an unidentified investigator for the Board has questioned "substantially all of the witnesses [unidentified] including several [unidentified] who have refused to submit to interrogation by this defendant." It is further asserted that the unidentified investigator "has from time to time revealed to witnesses [unidentified] friendly to defendant the substance [unexplained] of what other witnesses [unidentified] have stated," and that conflicting statements of unidentified witnesses adverse to defendant have been revealed. In our opinion such triple hearsay clearly fails to establish a basis for the extensive production embraced within the trial court's order. We

earlier discussed the cases dealing with grand jury and informer privileges simply to demonstrate that, even as to them, the production here sought would be denied. There is among those cases, and the many others examined by us, none which would compel mid-inquiry, pretrial production even of grand jury minutes based upon an unverified motion which states only conclusions based upon multiple hearsay statements by unidentified persons. That motion is merely a "rummaging * * * for exculpatory scraps." *United States* v. *Soto* (7th Cir. 1958), 256 F.2d 729, 734.

We believe defendant and the trial court failed to recognize the unique nature of the case before us, and the differing due process considerations applicable to it. Our concept of the due process guaranteed by our constitutions equates it with fundamental fairness. (*In re Murchison* (1955), 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623; *Palko* v. *Connecticut* (1937), 302 U.S. 319, 82 L. Ed. 288, 58 S. Ct. 149; see J. Nowak, R. Rotunda & J. N. Young, Handbook on Constitutional Law 501 (1978).) One of the reasons for permitting the limited disclosure of normally privileged grand jury testimony and informers' identities in the usual case is that the information disclosed is already known to the prosecutor or readily accessible to him. When a defendant can demonstrate a substantial need for that information which is already known or available to his adversary, considerations of basic fairness tend to favor its disclosure to him, absent compelling reasons to the contrary. But in the case before us the prosecutor has no greater access to the information and statements sought by defendant than does defendant. As to that information the scales are not unequally balanced and no advantage rests with the prosecution. Consequently there exists substantially less compulsion to break the seal of confidentiality

with which our constitution has clothed the Board proceedings.

We do not believe, however, the confidentiality provision of section 15(c) can be regarded as erecting an impenetrable barrier to any disclosure, no matter how essential that disclosure might be to a correct conclusion of the criminal proceedings in which the judge under investigation is a defendant. Such an interpretation could not withstand scrutiny in the light of due process requirements of the Federal Constitution and its supremacy clause for "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts * * *." (*United States* v. *Nixon* (1974), 418 U.S. 683, 707, 41 L. Ed. 2d 1039, 1063, 94 S. Ct. 3090, 3107; *Reynolds* v. *Sims* (1964), 377 U.S. 533, 584, 12 L. Ed. 2d 506, 540, 84 S. Ct. 1362, 1393.) In *Nixon* the Supreme Court considered whether a *subpoena* should be quashed because it demanded tapes of confidential conversations between the President and his close advisors which were asserted to be privileged from disclosure. The court there found the Presidential privilege to be "fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." (418 U.S. 683, 708, 41 L. Ed. 2d 1039, 1064, 94 S. Ct. 3090, 3107.) Nonetheless, held the court, "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." (418 U.S. 683, 712, 41 L. Ed. 2d 1039, 1066, 94 S. Ct. 3090, 3110.) "We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in con-

fidentiality [as contrasted to questions of national security], it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." (418 U.S. 683, 713, 41 L. Ed. 2d 1039, 1066-67, 94 S. Ct. 3090, 3110.) We regard the holding and discussion in *Nixon* as dispositive of the contention that the 15(c) confidentiality provision cannot be subordinated to Federal due process needs. Nor does the fact that the Board's investigation is independent from that of the police and State's Attorney, and that the latter have no greater access to its results than does the defendant, totally insulate the Board from due process requirements. While the holding in *Brady* v. *Maryland* (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, that failure to disclose favorable evidence to a criminal defendant upon his request violated due process involved only evidence in the prosecutor's possession, other decisions have extended the obligation of disclosure to embrace evidence in the possession or control of other governmental agencies. (*United States* v. *Loman* (7th Cir. 1977), 551 F.2d 164; *United States* v. *Deutsch* (5th Cir. 1973), 475 F.2d 55; *United States* v. *Bryant* (D.C. Cir. 1971), 439 F.2d 642.) While the governmental agencies in the cited cases were, perhaps, more closely related to the prosecuting agency than is the Judicial Inquiry Board, the Board is still an agency of the prosecuting sovereign. Although having no connection with the prosecutor's office, there are similarities between the duties of that office and the Board's function in the discharge of its important responsibilities in maintaining the high standards of judicial conduct which our rules impose. In the infrequent cases where a judge is a defendant in a criminal case the Board will undoubtedly be

conducting an investigation, as it is here, to determine whether the conduct on which the criminal charge is based should also be the basis for a complaint before the Courts Commission. If in the course of that investigation the Board comes into possession of evidence or material which in the Board's opinion on its face plainly negates defendant's guilt, it would, in our judgment, be contrary to the due process philosophy underlying *Brady* to deny production of that evidence upon defendant's request. We accordingly hold that as to evidence or material in the Board's possession which on its face plainly negates defendant's guilt, and only as to such material or evidence, the confidentiality provisions of section 15(c) must yield to Federal due process requirements, and that, upon defendant's request, its production and delivery to him may be ordered. Responsibility for determining the character of such material must remain with the Board, for to permit inspection of all material by defendant would reduce the privilege to a sham. Nor would an *in camera* inspection by the court be desirable for the purpose of isolating that which we hold must be produced. The producible material is only that which on its face plainly negates guilt, and we do not doubt the Board's competency to make that determination. Precluding court inspection also avoids the possibility that lawyers would be reluctant to cooperate in Board investigations because they know their statements may be examined by judges.

The writ of *mandamus* is accordingly awarded directed to Judge Hartel to vacate his December 14 production order.

Writ awarded.

MR. JUSTICE CLARK, concurring in the decision:

This case requires us to balance the competing needs of two separate and distinct adjudicative processes, the criminal justice process and the judicial disciplinary process. In its current posture, this case has been interfering with the effective operation of both processes. Therefore, for the reasons which follow, I concur in the award of the writ on the terms stated in the plurality opinion. However, my approach to this case differs in some respects from that stated in the plurality opinion.

Section 15(c) of article VI of our constitution provides in part, "All proceedings of the [Judicial Inquiry] Board shall be confidential except the filing of a complaint with the Courts Commission." In my opinion, this provision was intended exclusively for the protection of judges under investigation. The majority report (which is not contradicted in this respect by the minority report) of the Committee on Judiciary on Recommendations in Proposal Number 2 states: "To protect judicial officers against irresponsible charges and complaints, all proceedings of the Inquiry Board are to be confidential except the filing by it of a complaint with the Courts Commission." (6 Proceedings 867.) The committee further amplified this language later in the report:

> "The requirement that proceedings antecedent to the filing of a formal complaint be confidential has already been noted. In addition, the requirement that a majority of all members of the Inquiry Board must concur in a decision to file a complaint underscores the seriousness of such an action. There is too much at stake to permit *public* complaints to be filed by less than a majority of the entire membership of the Inquiry Board. Even a subsequent vindication of the judge by the Courts Commission will not undo the damage of a complaint based upon inadequate investigation or insufficient evidence." (Emphasis added.) (6 Proceedings 871.)

I find it persuasive that, in explaining the intent of the confidentiality provision, the drafters made no mention of an intent to protect witnesses and complainants. I therefore would construe the above-quoted language of section 15(c) of article VI of the Constitution as a protection of the judge under investigation, which that judge may waive.

Our inquiry does not end here, however, for the ability of the judge to waive the confidentiality of the Board's proceedings does not imply a corresponding right to compel their disclosure. As the plurality opinion correctly points out, the confidentiality of complaints and testimony presented to the Board serves important purposes, not the least of which is the encouragement of candor through protection against retribution. A qualified privilege against the premature disclosure of the complaints and testimony before it therefore is essential to the effectuation of the Board's constitutional mandate and may be implied therefrom.

It is extremely significant in this regard that the Constitution gives the Board the power and duty to "adopt rules governing its procedures" (Ill. Const. 1970, art. VI, sec. 15(d)). The drafters noted that "[t]he investigative procedures of the Inquiry Board are not spelled out. These are properly left to the Board's rules." (6 Proceedings 871.) I would be inclined to give great deference to a thoroughly considered and carefully drafted rule providing reasonable standards and procedures for the disclosure to a judge under investigation of information obtained

through that investigation. I also would find significant the approach of the many other jurisdictions which have dealt with various aspects of this problem, in reviewing the reasonableness of any such rule. See generally *Landmark Communications, Inc.* v. *Virginia* (1978), ... U.S. ....., ..., 56 L. Ed. 2d 1, 15-16, 98 S. Ct. 1535, 1545-46 (citations to provisions in several jurisdictions).

Since no such rule is now before us, the application of the Board's qualified privilege to the facts of this case must be analyzed generally in terms of the purposes of the privilege and the competing needs of the criminal justice process. The Board's need for some degree of confidentiality stems primarily from its dependence upon the trust of individuals who otherwise might fear retribution at the hands of an accused judge. Compelled disclosure of the Board's records will, to some degree, undermine that trust. However, since the only instance when such disclosure can be compelled would be the rare case involving a judge against whom criminal proceedings had been instituted regarding the same or related misconduct, potential complainants and witnesses can be assured that it is highly unlikely that their testimony will be revealed.

In addition, a judge accused of criminal (including misdemeanor) misconduct is not entitled to indiscriminately demand to see everything in the Board's file on him, as was done in the instant case. Thus, on the facts of this case, and in light of the complete lack of particularity with which the accused judge's original demand was stated, I agree that the discovery permitted in this case should be limited to "evidence or material in the Board's possession which on its face plainly negates defendant's guilt." (72 Ill. 2d at 238.) However, I am not persuaded that, in a proper case, the scope of discovery afforded a judge accused in a criminal proceeding need not be somewhat broader to effectuate fully the truth-finding and exculpatory functions of the criminal justice process. In my opinion, therefore, in a proper case, discoverable material would include any information or material in the Board's possession which tends to negate defendant's guilt or which would undermine substantially the credibility of a potential witness against the defendant at trial. I would expect the Board to comply fully with both the letter and spirit of this standard, and to submit any material regarding which a reasonable basis for disagreement exists (as to its discoverability) to the court for its *in camera* inspection.

For the foregoing reasons, I concur in the award of the writ on the terms stated in the plurality opinion.

Mr. Justice Goldenhersh took no part in the consideration or decision of this case.

Mr. Chief Justice Ward, specially concurring:

The construction of the written law, whether in statutory or constitutional form, is at times admittedly an uncertain and difficult art. The drafters of our constitution and the voters who approved it, however, would be astonished and perturbed to learn that this court has made it possible for the Judicial Inquiry Board to withhold from a criminal trial exculpatory evidence, requested by an accused judge or ordered by a trial court, which could produce a reasonable doubt of guilt. This is because the plurality says the Board need only produce upon the accused judge's request "evidence or material in the Board's possession which on its face plainly negates defendant's guilt." (72 Ill. 2d at 238.) This disclosure standard of plainly negating guilt is of course completely arbitrary and without precedent

in any jurisdiction. I consider it to be offensive to the Federal command of due process and fair trial and of course to the commands of our constitution as well. An additional problem arises when one attempts to determine what is meant by the described standard. The plurality states confidently: "The producible material is only that which on its face plainly negates guilt, and we do not doubt the Board's competency to make that determination." (72 Ill. 2d at 238.) Many will say, however, that it is a standard easily stated but difficult to interpret and to apply. Whether the Board will have experienced difficulties of interpreting and applying in cases of nondisclosure probably will never be known, for its decision not to disclose cannot be reviewed.

The fundamental of construction is to determine intent. The plurality opinion here fastens on the word "confidential" with a literalness I am sure never was intended. I would point out that this literal interpretation also creates the following offensive anomalies so far as the policy of this court is concerned as to disciplinary proceedings against judges and against lawyers. Our Rule 766 (65 Ill. 2d R. 766) declares that the proceedings before the inquiry, hearing and review boards of the Illinois Attorney Registration and Disciplinary Commission shall be private and confidential, subject to certain specified exceptions. Court records will show, however, that the Commission, which was created by our Rule 751 (58 Ill. 2d R. 751) and which operates under this court's direction, has responded to *subpoenae duces tecum* for investigative records in matters which involved complaints filed before the Commission against attorneys. The plurality focuses on the words "all proceedings of the [Judicial Inquiry] Board shall be confidential" and states that a judge who is an accused in a criminal proceeding cannot obtain

exculpatory evidence unless the evidence in the Board's possession "on its face plainly negates defendant's guilt." But an adversary of an attorney against whom a complaint has been filed can, by subpoena, secure evidence in the possession of the Commission despite our rules declaring that the proceedings before the Commission shall be confidential. It seems to me that this court will be vulnerable to a charge of giving one meaning to confidentiality when applied to attorneys and another meaning when applied to judges. We will not be able to evade this criticism by saying that one direction making proceedings confidential is set out in a rule of court and the other is set out in the Constitution, for that cannot be a critical distinction. The requirement of fair trial is not to be frustrated by either a rule of court or by a constitution. It should also be pointed out that Rule 766 states that, at the request of the attorney against whom the complaint has been filed, the proceedings shall be public. This court, in promulgating the rule, recognized that the confidentiality provision was for the benefit of the attorney who might be complained against and could be waived by him. The plurality concludes differently in this case involving a judge and a confidentiality provision.

In *New York Times Co.* v. *Jascalevich* (Aug. 1, 1978), 47 U.S.L.W. 3066, 3067, Justice White, sitting as circuit justice, stated that there was no constitutional privilege for newsmen to withhold subpoenaed documents material to the defense of a criminal case. The circumstances considered by Justice White, though not in precise alignment with those here, resemble them. Justice White's denial of the stay applied for supports the position that the plurality opinion here seriously errs in limiting the right to prepare a defense.

I would also observe that the principal opinion speaks of the "encouragement and protection of witnesses" (72 Ill. 2d at 230) as a consideration in denying the production even of evidence that would exculpate an accused. Concern for the safety of witnesses is hardly a factor when the evidence is exculpating, unless we act on a devastating assumption that the People will undertake to harass and intimidate witnesses.

I suppose it is inevitable that there will be cases in which the Judicial Inquiry Board will file complaints with the Courts Commission after the trial of a judge in which exculpatory evidence under the plurality's view was withheld from the trial court or jury and the judge was found guilty. Discovery will be available to the judge in the Courts Commission proceeding, and he may in a given case then obtain exculpating evidence which, if it had been available earlier, would almost certainly have resulted in his acquittal in the criminal proceeding. That will be an irony to ponder when and if it occurs.

Notwithstanding my disagreement with much of what the plurality opinion states, I consider that the order of the trial court was too broad that directed the Board to make available all statements that a witness gave earlier to the Board. I think that the trial court's order should have been confined to statements that were material, relevant and usable to impeach.

MR. JUSTICE MORAN, also specially concurring:

While I believe a writ of *mandamus* should issue in this case, I differ from my colleagues on the command of the writ and the reasons for it. I believe, as does Mr. Justice Clark, that a criminal defendant is entitled to a broader scope of discovery than that permitted in the plurality's

opinion but, in contrast to Mr. Justice Clark, feel this is a proper case for that broader scope. The trial court's order, requiring disclosure, attempted to strike a proper balance between the confidentiality requirement of article VI, section 15(c), of the Illinois Constitution and the defendant's guarantee of a fair trial under the fifth and sixth amendments to the United States Constitution. It is the procedural aspects of the order that I would modify.

The Board, in its brief, has enumerated policy reasons for required confidentiality, reasons additional to that of protecting judicial officers from irresponsible charges and complaints. Mr. Justice Clark has aptly observed that neither the reports of the constitutional convention nor relative debates indicate that the confidentiality requirement of section 15(c) was intended to serve any purpose other than to protect the judicial officer under investigation. Additional purposes for the confidentiality requirement must be inferred from the nature of the Board's duties.

There is no question that the Board can fulfill its responsibilities only if complaints and witnesses freely come forward with information. Such free flow of information depends, in part, on a person's expectation of confidentiality to shield him from possible recrimination by an individual subject to investigation. It is this countervailing need to protect complainants and witnesses so as to encourage the voluntary disclosure of information which necessitates the balancing of defendant's right to a fair criminal trial against the implied policy which justifies nondisclosure. In balancing these needs, the plurality has emphasized the constitutional guarantee of confidentiality, forgetting, however, that "[t]he right to the production of all evidence at a criminal trial similarly has constitutional

dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *United States* v. *Nixon* (1974), 418 U.S. 683, 711, 41 L. Ed. 2d 1039, 1066, 94 S.Ct. 3090, 3109.

In addressing the defendant's right to disclosure, the plurality has extensively discussed the law regarding discovery in the criminal setting. The prosecutor's equal or greater access to the same information is, however, in my opinion, here irrelevant, for it is defendant's right in a criminal trial to the production of all available evidence with which we are here concerned.

The plurality limits disclosure to evidence which "on its face plainly negates defendant's guilt." In my opinion, due process requires disclosure of all information or material in the Board's possession (excluding the Board's work product) which *tends* to exculpate the defendant, as well as statements by a complainant or witness which would undermine the credibility of that person's testimony against the defendant at his criminal trial.

As to exculpatory evidence, the need for confidentiality is minimal. Complainants and witnesses who give exculpatory testimony before the Board have little reason to fear recrimination. Moreover, the need of a criminal defendant for any evidence which might tend to exculpate him is particularly acute. As this court has stated in the past, for

the policy of confidentiality to be soundly based, it must be more desirable to risk concealment of the truth than to disrupt the values that such policy supports. (See *People ex rel. Noreen* v. *Dempsey* (1957), 10 Ill. 2d 288, 293.) Here, the need for confidentiality does not outweigh defendant's need for that which might vindicate him in his criminal trial.

As to statements which undermine the credibility of a witness who testifies against the defendant at a criminal trial, discoverability should also be allowed. The policy of protecting a witness' expectation of privacy must yield as to those matters to which he has testified in the criminal proceeding. (Accord, *People* v. *Johnson* (1964), 31 Ill. 2d 602, 606, regarding the disclosure of secret grand jury testimony.) Evidence which strikes at the credibility of a witness in a criminal case is as crucial to the defendant as that which tends to exculpate his guilt.

It was previously noted that the trial court's order attempted to balance the countervailing constitutional provisions discussed. The order compelled the Board to, within 14 days, deliver to the court for its inspection all material acquired during the Board's investigation. That which tended to exculpate the defendant was to be released to the defendant. The order further required that, at the time of trial, the Board was to produce all statements made by any person named in the State's list of witnesses in the criminal proceeding, the statements to be made available to the defendant for impeachment purposes at the conclusion of a witness' direct trial testimony. I believe, however, that the order is procedurally too broad.

To accommodate the confidentiality requirement to the fullest, while, simultaneously, effectuating defendant's right

to a fair criminal trial, the initial determination of whether there exists any exculpatory evidence (not just evidence which "on its face plainly negates defendant's guilt") should be made by the Board. Where such evidence exists, the Board, on proper order of the court, should release it to the defendant forthwith. If Board members disagree on whether certain material or evidence is, in fact, exculpatory, the disputed material or evidence should be submitted to the trial court for its *in camera* inspection and its ultimate determination. In this regard, Mr. Justice Clark and I take similar positions.

Statements made before the Board by a witness who testifies in the criminal proceedings should be made available for the court's *in camera* inspection. The court should determine that portion of the statement which is relevant to the witness' in-court testimony and turn only that portion over to defendant's counsel for possible impeachment purposes.

These procedures, in my opinion, would assure the confidentiality of material that should not be disclosed and afford the defendant his constitutional right to a fair criminal trial.

I would, therefore, award the writ directing the trial court to modify its order to conform to the views here expressed.

ILLINOIS SUPREME COURT

Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706

(217) 782-2035

September 29, 1978

Mr. Charles O'Laughlin
Attorney at Law
Jenner & Block
One IBM Plaza
Chicago, Il 60611

No. 50286 — People ex rel. The Illinois Judicial Inquiry Board, et al., etc., petitioners, v. The Honorable Harry D. Hartel, Jr., Associate Judge of the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois, et al., respondents. Mandamus and Prohibition.

The Supreme Court today denied the petition for rehearing in the above entitled cause. Mr. Justice Goldenhersh took no part.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

State Of Illinois
County Of Lake—ss.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES A. ALFANO,

Defendant.

ORDER

The matter coming on to be heard on C. George Niebank, Jr., Chairman of the Illinois Judicial Inquiry Board (The "Board") motion to quash the Subpoena Duces Tecum.

The Court having heard the arguments of counsel, reviewed the briefs and memorandum submitted and being otherwise fully advised in the premises;

ORDERS, DECREES AND ADJUDGES that:

The motion to quash is denied and the Illinois Judicial Inquiry Board shall comply with the Subpoena as follows:

1. The Board shall produce at the time of trial all written statements, and all oral statements reduced to writing which are verbatim or substantially verbatim made by any person named on the state's list of witnesses, a copy of which is attached hereto.

The statements of any witness who testifies at the trial shall be made available to the defense upon the conclusion of the witnesses' direct testimony for the use of the defendant for impeachment purposes, if any.

2. The Board shall produce, within 14 days of the date of this order, for inspection by the court of all evidence obtained by the Board during the Board's investigation of the conduct of the defendant in its investigation of the incident leading to the criminal charge before the court. The court shall examine the evidence it shall, excluding any work products and excluding the disclosure of any informant whose identity is a prosecution secret, deliver to the defendant any evidence which tends to negate the defendant's guilt or which is of an exculpatory nature.

Enter:

.....

Harry D. Hartel, Jr., Associate Judge

Dated at Waukegan, Illinois
this 14th day of December, 1977.

State Of Illinois
County Of Lake—ss.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES A. ALFANO,

Defendant.

MEMORANDUM OPINION

The court has considered the arguments of counsel and their respective well reasoned briefs. Since both sides suggest that several novel issues involving the policy and procedures of the Illinois Judicial Inquiry Board have been raised the court considers it appropriate to enter this memorandum in explanation of the order entered on December 14, 1977.

The facts are not in dispute and are adequately set out in the Memorandum originally filed by the Board.

The constitutional creation of the Inquiry Board and Court's Commission reflects the desire of the delegates to the constitutional convention and the people of the state of Illinois to establish a Judiciary committed to the highest standards of Judicial conduct.

The Board's primary function is to investigate the conduct of judicial officers and when they deem appropriate recommend disciplinary proceedings.

The function of the court is to guarantee every citizen charged with a criminal offense a fair and impartial trial which both substantively and procedurally are consistent with the mandates of the Constitution and laws of the State of Illinois.

The court ought not impede the functions of the Board and of course the Board cannot impede judicial functions which are vested solely in the Judicial Branch of Government by Article 6, Section 1 of the 1970 Constitution of the State of Illinois, *People ex rel Harrod* v. *Illinois Court's Commission*, decided by our Supreme Court on November 30, 1977.

In this criminal proceeding as opposed to the investigatory proceedings of the Board, principles of discovery are governed by legislative enactments, case law and Supreme Court Rule.

The Supreme Court pursuant to its rule making power has adopted rules for discovery in felony cases. In adopting these rules the Supreme Court rejected the broader A.B.A. Standards which would have made discovery applicable to some misdemeanors.

Absent discovery rules in misdemeanor cases the trial court has no discretion to expand the scope of discovery beyond the requirements of due process or legislative enactments. *People* v. *Schmidt*, 56 Ill. 2d 572.

The Board in its brief argues that the agreement between the prosecutorial authority and the defense to apply the felony discovery rules cannot be binding on the Board. Without dealing with that issue it is clear that the agreement is not binding on the court and as the arguments dur-

ing the November 30, 1977 hearing shows, it was not the intent of either party to apply those rules to the evidence, if any, in the hands of the Inquiry Board. It is also clear from that hearing that the Board has taken a verbatim statement from the Deputy whom the state calls the complaining witness and who undoubtedly will be called to testify at the time of trial.

Clearly the defendant is entitled to statements of witnesses who testify at the trial, after the completion of their direct testimony for purposes of impeachment. *People* v. *Moses,* 11 Ill. 2d 84.

> "The state has no interest in interposing any obstacle to the disclosure of the facts unless it is interested in convicting accused parties on the testimony of untrustworthy persons." *People* v. *Moses, supra.*

To withhold such statements violates the United States Constitution, *Levin* v. *Clark,* 408 F. 2d 1209, and the constitution of the State of Illinois, *People* v. *Cagle,* 41 Ill. 2d 528.

The defendant is also entitled to any evidence in the hands of the state which tends to negate the defendant's guilt. *Brady* v. *Maryland,* 373 U.S. 83. Notwithstanding the absence of discovery rules in misdemeanor cases, the due process requirement of *Brady* applies to these proceedings. *People* v. *Schmidt, supra.*

The Supreme Court has specifically provided for a procedure to implement the production of "Brady material". Supreme Court Rule 412 (g) does not enlarge the scope of discovery but provides a means to fulfill the mandates of *Brady* and its progeny.

The procedural means designed by Supreme Court Rule 412 (g) are as necessary to meet the requirements of due process in felony cases as they are to meet the due process requirements of misdemeanor cases.

The Board's contention that it is "constitutional autonomous from all other branches, agencies, and offices of the Illinois State Government", is not substantially different from the contentions raised in *People ex rel Harrod, supra* and as the court there said at page 5, "To suggest that only the commission *or the Board* can interpret and determine the scope of its own authority is to imply that this court is without the power to determine whether the constitution grants it or limitations have been exceeded. Such an implication must be totally rejected."

The implication that the Board or commission by its procedural rules can determine the extent of compliance with due process in a criminal proceeding must be totally rejected.

If the court were to adopt the Board's contention that Article VI, Section 15 (c) of the State Constitution is an absolute prohibition of any disclosure including the disclosure of evidence that the Federal Constitution mandates be disclosed under the 14th Amendment, the court would have to find Section 15 (c) invalid.

A more rational interpretation would permit the Board to maintain its confidentiality except where greater interests are at stake, such as a defendants' right to a fair trial.

The harm done to the commission is more imagined than real, as clearly demonstrated by *People* v. *Johnson,* 31 Ill. 2d 602 and *People* v. *French,* cited in the Board's brief.

If the Board wishes not to disclose the type of material required by the order of December 14, 1977 it need only stay its investigations of criminal complaints until such time as an accused determination of guilt or innocence is determined by a court.

Enter:

.....

Harry D. Hartel, Jr., Associate Judge

Dated at Waukegan, Illinois
this 14th day of December, 1977.

Supreme Court, U. S.
FILED
JAN 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1021

CHARLES A. ALFANO,

Petitioner,

vs.

THE ILLINOIS JUDICIAL INQUIRY BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1021

CHARLES A. ALFANO,

Petitioner,

vs.

THE ILLINOIS JUDICIAL INQUIRY BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The Court does not have jurisdiction under 28 U. S. C. § 1257 to entertain the Petition for the reason that the ruling below for which it seeks review is not a "final judgment or decree," as discussed more fully in Section I of the Argument.

QUESTIONS PRESENTED

Respondent disagrees with the Petition's Statement of the Questions Presented. The Questions Presented are:

1. Whether an interlocutory, no-clear-majority ruling of the Illinois Supreme Court that is subject to being modified

or rendered moot by further proceedings is a "final judgment or decree" as required for this Court's jurisdiction under 28 U. S. C. § 1257.

2. Whether the plurality decision of the Illinois Supreme Court granting an Illinois state court judge who is a defendant in a misdemeanor prosecution limited discovery of investigative materials compiled by Illinois' independent Judicial Inquiry Board (the "Board") struck a proper balance between the defendant's interest in generalized discovery and the requirement of the Illinois Constitution that the Board's investigative materials be kept confidential.

3. Whether the plurality decision of the Illinois Supreme Court erred in concluding that the Illinois Constitution's policy of confidentiality for information obtained in the investigative phase of judicial disciplinary proceedings warranted entrusting the Board with responsibility for reviewing its own materials to determine what should be produced in a pending misdemeanor prosecution against the judge under investigation by the Board.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Illinois Constitution, Article VI, Section 3:

> The Supreme Court shall consist of seven Judges. Three shall be selected from the First Judicial District and one from each of the other Judicial Districts. Four Judges constitute a quorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years.

United States Code, Title 28, Section 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition is adequate except that it states only (Petition 5) that "There was no majority opinion of the Illinois Supreme Court," but it omits the more important fact that there was no clear majority *decision* of the Illinois Supreme Court except that the trial court had been wrong. That absence of a majority decision on any definitive substantive principle makes misleading Petitioner's statement (Petition 7):

> "The Illinois Supreme Court *held* that under *Brady* [v. *Maryland*, 373 U. S. 83 (1963)] petitioner is not entitled to all favorable evidence, but only to evidence which 'on its face, plainly negates guilt.'" (Emphasis added.)

Instead the separate opinions of the various Illinois Supreme Court Justices reflect the limited and interlocutory character of the Illinois Supreme Court's actual holding.

Six of seven Illinois Supreme Court Justices participated in the decision for which the Petition seeks review. All six agreed that the trial court order before them had been erroneously issued. They did not agree, however, as to the governing principles or as to the specific disposition that the case should be given.

Only four of the participating justices concurred in the award of the writ as granted—directing that the trial court order be vacated. The other two participating justices would merely have

directed the entry of a more narrowly drafted trial court order, and for that reason they concurred only specially.

Only three justices (Justices Underwood, Ryan and Kluczynski) joined in the plurality opinion, which concluded that the scope of required disclosure should be limited to material that "plainly on its face negates [Petitioner's] guilt" (72 Ill. 2d 238, Petition A. [hereinafter "A."] 15). Those three justices were also the only ones to conclude that the question of what material falls wtihin the scope of required disclosure should be determined solely by the Illinois Judicial Inquiry Board (the "Board") (72 Ill. 2d at 238, A. 15). Accordingly, although much is made of those matters in the Petition, there is no *decision* of the Illinois Supreme Court on either point. Illinois law requires the joinder of *four* justices to constitute a decision of its Supreme Court. See Section II of Argument.

The fourth concurring justice (Justice Clark) and the two specially concurring justices (Justice Ward and Moran) were all in essential agreement that the scope of required disclosure should generally include "any information or material in the Board's possession which tends to negate [Petitioner's] guilt or which would undermine substantially the credibility of a potential witness against the [Petitioner] at trial" (72 Ill. 2d at 241, A. 19, Clark, *J.*, concurring; see also 72 Ill. 2d at 246, A. 26, Moran, *J.*, specially concurring). Justice Clark disagreed with Justices Ward and Moran as to the specific disposition of the case only because of "the complete lack of particularity with which [Petitioner's] original demand was stated" (72 Ill. 2d at 241, A. 18). Justice Clark was therefore of the opinion that this was not "a proper case" for ordering the scope of disclosure that he would generally require (72 Ill. 2d at 241, A. 18-19).

Justices Clark and Moran further agreed with one another that the procedures for implementing Petitioner's claimed disclosure rights should include provision for judicial review (through an *in camera* inspection) in doubtful cases (72 Ill. 2d at 241,

A. 19, Clark, *J.*, concurring; 72 Ill. 2d at 248, A. 26, Moran, *J.*, specially concurring).

Justice Ward stated no opinion as to the need for judicial review, apparently being of the opinion that the issue was not then before that court (72 Ill. 2d at 244, A. 22).

ARGUMENT

Respondent respectfully submits that a Writ of Certiorari should not issue for several independent and self-sufficient reasons:

First, the decision by the Supreme Court of Illinois for which Petitioner seeks review is not a "final judgment or decree," as required for this Court's jurisdiction under 28 U. S. C. §1257. Further proceedings before the trial court in the misdemeanor prosecution against Petitioner Alfano may moot the entire controversy or substantially change the posture in which it might properly reach this Court.

In addition, from each of the relevant perspectives of the issues involved, the case as now before the Court presents no important issues of federal law that require decision by this Court.

Finally, the matters raised in the Petition were clearly decided correctly below.

I.

The Decision Below Is Not a "Final Judgment or Decree."

Of paramount importance to the Court's disposition of the Petition is the very limited nature of the holding below—an aspect of the case that Petitioner entirely misportrays in the Petition.

At most, the holding below requires vacation of an overly broad trial court production order.[1] Because there was no clear

1. See 72 Ill. 2d at 244-45, A. 22, Ward, *J.* specially concurring; 72 Ill. 2d at 247, A. 25, Moran, *J.* specially concurring. The text of the trial court order is set forth at A. 28-29.

majority decision, that holding does not decide what disclosure might be required under a more precise document request and trial court production order such as Justices Clark, Ward and Moran would collectively require (72 Ill. 2d at 241, 245 and 246, respectively; A. 18, 22 and 25, respectively). See Section II of Argument.

Moreover, even under the three-judge plurality opinion there is no way of predicting what specific materials will be disclosed[2] nor whether Petitioner might be able to establish in the course of further proceedings below a specific and compelling need for particular disclosure that he has thus far failed to establish. See Section IV of Argument.

Additionally, Petitioner's asserted due process rights will not have been violated if he should ultimately prevail on the merits of the misdemeanor prosecution that is still pending against him. *United States* v. *Agurs*, 427 U. S. 97, 108 (1976). Such a result would render moot any claim for disclosure.

In summary, there is at present a lack of finality and certainty regarding each of the following: (1) what would be produced by the Board if the trial court were to enter a new order pursuant to the plurality opinion; (2) whether the plurality opinion would be superseded by a clear majority opinion if Petitioner made a more specific document request and the trial court entered a more specific production order; (3) whether additional documents might be ordered produced if Petitioner were to demonstrate a specific and compelling need; and (4) whether Petitioner will be acquitted of the misdemeanor charge pending against him in any case.

To grant the Petition under these circumstances would be in direct conflict with the fundamental principle that a decision for which review is sought is not "final" for purposes of the

2. Petitioner has not sought production from the Board pursuant to the plurality opinion, but has instead come directly to this Court. Petitioner therefore does not know what he would receive if he were to ask for it.

jurisdictional requirement in 28 U. S. C. § 1257 if its result contemplates further proceedings that may affect the ultimate outcome of the controversy. *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947); *Laclede Gas Light Co.* v. *Public Service Comm'n*, 304 U. S. 398 (1938); *Cincinnati Street Ry. Co.* v. *Snell*, 179 U. S. 395 (1900).

That principle has been given repeated application in circumstances, like those arising in this case, involving decisions affecting the claimed procedural rights of criminal defendants. For example in *Chapman* v. *California*, 405 U. S. 1020 (1972), this Court held that a trial court denial of a motion to suppress evidence was not final for purposes of Supreme Court review under Section 1257. *Accord, Cohen* v. *New York*, 385 U. S. 976 (1966); *Whitus* v. *Georgia*, 385 U. S. 545 (1967).

The principle has also been given repeated application in similar circumstances involving decisions that have defined the parameters of administrative authority, but have left open the specific action to be taken by the relevant administrative agency in further proceedings contemplated by the decision for which review has been sought. See, *e.g., Republic National Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *cf. Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939).

The jurisdictional requirement of finality had its genesis in important policies of judicial administration several of which are directly involved here. To forestall review until the specific impact of the decision below on Petitioner's claimed disclosure rights has been determined may avoid an unnecessary decision on constitutional issues. See *Rescue Army* v. *Los Angeles*, 331 U. S. 549, 568-69 (1947). At the very least, deferral of review would provide a factual record of what specific disclosures are made in response to the decision below and of their relationship to any specific and compelling need for disclosures that Petitioner may seek to demonstrate. *Id.*, at 573-75. In addition, deferral of review to a later date would avoid disruptive inter-

ference with Petitioner's ongoing misdemeanor prosecution. See *DiBella* v. *United States*, 369 U. S. 121, 124 (1962).

Even if the decision below were "final" under 28 U. S. C. § 1257, the furtherance of those important policies would dictate a discretionary denial of the Petition. *Rescue Army* v. *Los Angeles, supra: Naim* v. *Naim*, 350 U. S. 891 (1955). See also *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, esp. at 588 n. 2 (1972).

II.

Under Illinois Law the Decision Below Is Wholly Limited to Its Own Peculiar Facts.

Petitioner complains that the "decision" below (1) too narrowly confines the scope of required disclosure of confidential Board materials and (2) fails to establish adequate procedures for enforcing disclosure. It is crucial to note, however, that Petitioner's arguments are directed solely against the plurality views expressed in the opinion of only three members of the Illinois Supreme Court.[3]

Section 3 of Article VI of the 1970 Illinois Constitution provides in part:

> "The Supreme Court shall consist of seven Judges. . . . *Four Judges constitute a quorum and the concurrence of four is necessary for a decision.*" (Emphasis added)

Because the views expressed in the plurality opinion were joined by only three justices, those views have no precedential value. *Perlman* v. *First National Bank of Chicago*, 60 Ill. 2d 529, 331 N. E. 2d 65 (1975). Only the general *result* (holding the trial

3. No more than three justices agreed on any single resolution of either of the ultimate issues. The views expressed by Justice Clark in his concurring opinion and Justices Ward and Moran in their specially concurring opinions are all consistent with and, except for Justice Ward's failure to express any opinion as to the procedural aspects, essentially supportive of Petitioner's position as to both of the ultimate issues. Indeed, Petitioner explicitly relies on the views expressed by Justices Ward and Moran to support his arguments (Petition 7, 11, 12).

court order erroneous under the specific facts of this case) can be considered authoritative. See Black, *Handbook of Judicial Precedent* 135-36 (1912). The relevant legal principles remain undetermined by the decision. Wambaugh, *The Study of Cases* 50 (2d ed. 1894); *Alaska* v. *Troy*, 258 U. S. 101, 111 (1922). See *Miller* v. *California*, 413 U. S. 15, 22 n. 3 (1973), questioning the former authority of the earlier plurality standard for determining obscenity cases set forth in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); cf. *Redrup* v. *New York*, 386 U. S. 767, 770-71 (1967).

Thus the actual decision below could have no future relevance except in the remote possibility that another case might arise on the same precise facts. That factor alone vitiates the importance of this case as incorrectly characterized by Petitioner and justifies a denial of certiorari.

Moreover, as the remaining Sections of this Brief demonstrate, even were the plurality opinion considered (as it is not) a definitive decision, there would be several additional bases (discussed below) for non-review by this Court.

III.

The Petition Misstates the Impact That the Dictum in the Plurality Opinion Below Would Have on Brady v. Maryland.

To the contrary of the statement in the Petition's Reasons for Granting the Writ (Petition 7), even the dictum in the plurality opinion does not express an "unprecedented interpretation" of "this Court's decision in *Brady* v. *Maryland*, 373 U. S. 83 (1963)" having "far reaching consequences." Indeed, the plurality opinion does not purport to rely directly on *any* interpretation of *Brady*.

Instead, the plurality specifically recognizes the "unique nature" of this case, involving as it does materials (1) that are held by an agency of the state that is constitutionally created and

totally autonomous from the prosecution and (2) to which the prosecutor does not even have access (72 Ill. 2d at 233-34, 235-36, A. 11-12, 12-13). Those facts distinguish this case from the typical *Brady* situation, which involves materials "in the prosecutor's possession" or in the possession of "governmental agencies more closely related to the prosecuting agency" (72 Ill. 2d 233-34, 237, A. 11-12, 14).

The plurality opinion also recognized another and perhaps more fundamental distinction between this case and the typical *Brady* situation. In this case the criminal defendant's interest in access to the confidential materials comes into direct conflict with a compelling public interest in encouraging witnesses to come forth with information before the body responsible for initiating judicial disciplinary proceedings (72 Ill. 2d at 230, 231-33, A. 6, 8-10). This Court's own opinions since *Brady*, in dealing with similar issues of confidentiality, have scrupulously avoided any reference to *Brady* that would have given the decision in *Brady* controlling impact. See, *e.g.*, *Dennis* v. *United States*, 384 U. S. 855 (1966) (review of ruling on motion for production of secret grand jury testimony); *cf. Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 398 (1959) (similarly holding the production required under *Jencks* v. *United States*, 353 U. S. 657 (1957), inapplicable to a request for secret grand jury minutes).

Contrary to Petitioner's assertion (Petition 11), nowhere did the plurality even suggest that they considered *Brady* determinative of Petitioner's claims. They explicitly stated that they "regard[ed] the holding and discussion in [*United States* v.] *Nixon* [418 U. S. 683 (1974)] as dispositive of" the due process issues raised (72 Ill. 2d at 237, A. 14). At most, the plurality merely analogized to "the due process *philosophy* underlying *Brady*" (72 Ill. 2d at 238, A. 15) in a far-removed context.[4]

4. The reference in the plurality opinion (72 Ill. 2d at 234, A. 10) to *People* v. *Schmidt*, 56 Ill. 2d 572, 309 N. E. 2d 557 (1974), most clearly was not an attempt "to justify" an erosion of

(Footnote continued on next page.)

Because it does not even purport to represent a direct application of *Brady*, as such, the plurality opinion can hardly be viewed as Petitioner would characterize it—a "far reaching" attempt to "seriously undermine" the principles enunciated in *Brady* (See Petition 7). It represents no future threat to proper results in the more frequently recurring *Brady* type of situation.[5]

IV.

Petitioner Has No Due Process Right to the Compelled Disclosure He Seeks.

Petitioner's substantive claim is based on his erroneous premise "that a criminal defendant is entitled to every person's evidence" (Petition 9). Not so; the law is replete with common law, statutory and constitutional privileges that curtail and often totally preclude a criminal defendant's access to potentially relevant evidence. Examples include the attorney-client privilege, the husband-wife privilege, the doctor-patient privilege, the priest-penitent privilege, the newsman's privilege as to source (statutorily created in a number of states), the grand jury secrecy requirement, the informer's privilege and executive privilege.

Article VI, § 15(c) of the 1970 Illinois Constitution establishes an unambiguous and strict prohibition against disclosure

(Footnote continued from preceding page.)

the *Brady* principle (in the context of misdemeanor cases). The dictum in *Schmidt affirmed* the applicability of the *Brady* principle to misdemeanor cases as well as felony cases. The plurality opinion merely referred to the holding in *Schmidt* that the Illinois *criminal discovery rules* do not apply in misdemeanor cases like Petitioner's. That reference was in response to Petitioner's argument (not based on *Brady*) that Illinois Supreme Court Rule 412(g), Ill. Rev. Stat. ch. 110A, § 412(g), might statutorily require the disclosure sought.

5. Quite apart from the fact that the conclusion in the plurality opinion does not even purport to rest on a direct interpretation of *Brady* (limiting or otherwise), we note that this Court has itself cast doubt on the former breadth of *Brady* and its more immediate progeny by the very limited scope of required disclosure discussed in *United States* v. *Agurs*, 427 U. S. 97 (1976).

of information and materials acquired by the Board in the process of investigating alleged judicial misconduct, as the plurality opinion confirmed (72 Ill. 2d at 230, A. 6). That confidentiality requirement, though obviously intended to protect judges under investigation, serves also to protect complainants, witnesses and other participants in Board proceedings by "providing protection against possible retaliation and recrimination" (72 Ill. 2d at 230, 231-33, A. 6, 8-10). It thus facilitates the ability of the Board to carry out its own constitutional duties by "encourag[ing] the willing participation of relevant witnesses" (*Id.*). The plurality recognized the compelling nature of those important public interests embodied in the state constitutional mandate (*Id.*). This Court itself has recently referred to the almost total uniformity (with the one exception of Puerto Rico) with which confidentiality requirements are incorporated into the judicial disciplinary systems established in 49 jurisdictions and the importance of the same public interests served by confidentiality. *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829, 834-36 (1978).

To the extent the confidentiality requirement protects complainants and witnesses it establishes, in effect, a privilege on their behalf against disclosure of their identities and their confidential communications made to the Board. In that respect the prohibition is an Illinois constitutional affirmation and particularized amplification of the more general common law privilege (the "informer's privilege") as to the identity of persons providing confidential information to government law enforcement officials. See *Scher* v. *United States,* 305 U. S. 251 (1938). Moreover, the confidentiality that attaches to Board proceedings and materials is strongly analogous to the secrecy requirement applicable to grand jury proceedings.[6] See discus-

6. In the two-tiered Illinois judicial disciplinary system the Board's function is directly analogous to that of a grand jury in a criminal proceeding. Under Article VI, § 15(c) of the 1970 Illinois Constitution, the Board is responsible for determining by vote on the basis of investigative materials and the sworn testimony of witnesses before it whether "a reasonable basis exists" to bring charges against a judge before the Courts Commission, which tries such matters.

sion in *United States* v. *Procter & Gamble,* 356 U. S. 677, 681 n. 6 (1958); *Smith* v. *United States,* 423 U. S. 1303 (1975); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395 (1959). The plurality opinion recognizes and relies on those analogies in its analysis (72 Ill. 2d at 230-31, 235, A. 7, 11-12).

In any event, disclosure (even to a court *in camera*) should not be required absent a demonstration by the person seeking access to Board materials of a *compelling and specific need* for such disclosure. That has been this Court's approach in other but similar circumstances involving requests for disclosure of information having limited confidentiality. See, *e.g., Roviaro* v. *United States,* 353 U. S. 53 (1957) (need sufficiently demonstrated to overcome informer's privilege); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395 (1959) (grand jury secrecy not overcome); *United States* v. *Nixon,* 418 U. S. 683 (1974) (need sufficiently demonstrated to overcome executive privilege). The decision in *In re Farber,* 78 N. J. 259, 394 A. 2d 330, 338 (1978), *cert. denied* ..... U. S. ..... (Nov. 28, 1978), relied on by Petitioner, makes that point equally clear in the context of a state statute establishing a newsman's privilege as to source.

In our case the plurality opinion interpreted the Illinois constitutional requirement of Board confidentiality as embodying public interests—as a matter of Illinois law—that are even more compelling than those embodied in the grand jury secrecy requirement and the informer's privilege, and from that concluded that a stronger showing of need would be required to displace Board confidentiality (72 Ill. 2d 230, 231-32, 235, A. 6, 8, 11-12). Quoting from Petitioner's trial court application for compelled disclosure, the plurality noted (72 Ill. 2d at 234-35, A. 11):

> Production is sought on the basis of [Petitioner's] assertion, apparently *unsupported by testimony or affidavit,* that an unidentified investigator for the Board has questioned "sub-

> stantially all of the witnesses [unidentified] including several [unidentified] who have refused to submit to interrogation by [Petitioner]." It is further asserted that the unidentified investigator "has from time to time revealed to witnesses [unidentified] friendly to defendant the substance [unexplained] of what other witnesses [unidentified] have stated," and that conflicting statements of unidentified witnesses adverse to [Petitioner] have been revealed. (Bracketed material in original; emphasis added.)

Expressing severe criticism of Petitioner's reliance on such conclusory and unverified assertions derived from "triple hearsay" statements "by unidentified persons" as the basis for his claim, the plurality concluded that his disclosure demand "is merely rummaging . . . for exculpatory scraps" (72 Ill. 2d at 235, A. 11-12).[7] The plurality had noted earlier (72 Ill. 2d at 231, A. 8) that secret grand jury materials are simply not subject to court-compelled disclosure for the purpose of pretrial discovery in a pending criminal case and considered that the same should hold true as to confidential Board materials. See, *e.g.*, *United States* v. *Tager*, 481 F. 2d 97 (10th Cir. 1973), *cert. denied* 415 U. S. 914, *reh. denied* 416 U. S. 952 (1974); *United States* v. *Cole*, 449 F. 2d 194 (8th Cir. 1971), *cert. denied* 405 U. S. 931 (1972).

Petitioner's vague assertions regarding speculative possibilities clearly do not establish a specific need for any disclosure, much less the broad-scale disclosure (virtually all of the Board's investigative materials in the matter) that Petitioner's application to the trial court sought. *United States* v. *Alvarez*, 472 F. 2d 111, 113 (9th Cir. 1973), and cases cited therein; *Lannom* v. *United States*, 381 F. 2d 858, 861 (9th Cir. 1967). At the very least, the lack of evidentiary support for Petitioner's vague, unverified assertions constitutes a failure of proof to establish his claim.

7. Petitioner's statement (Petition 10 n. 1) that it would be "impossible" for him to present greater detail is specious in light of his acknowledgments in his trial court application, which reflects his acknowledged information as to the *substance* of the alleged conflicting statements, the *identity* of his "friendly" witness and knowledge as to the identities of other relevant witnesses.

Both from Petitioner's very presence at the occurrence giving rise to the misdemeanor charges and from his agreement with the prosecution to abide by the Illinois criminal discovery rules as to discovery in felony cases (see trial court Memorandum Opinion, A. 31), Petitioner's information as to the identity of occurrence witnesses is at least equal to that available to the Board. There is no hint, let alone evidence, to the contrary. Petitioner's assertions as to the unwillingness of some witnesses to cooperate with him (unsupported by testimony or affidavit) wholly ignores the availability of judicial process to elicit the relevant information. The fact that it may simply be more convenient to Petitioner to use the Board's materials does not establish a *compelling* need. *Smith* v. *United States*, 423 U. S. 1303, 1304 (1975).

Any suggestion by Petitioner that his need for disclosure is compelling because nondisclosure would, in his view, deprive him of a fair trial (see Petition 12) altogether misses the point that the demonstration of a compelling need is a *prerequisite* to required disclosure where a strong competing public interest in confidentiality is also involved. Unless Petitioner can *first* establish such compelling need, by definition nondisclosure does not affect his right to a fair trial.

V.

Petitioner Has No Constitutional Right to an In Camera Inspection.

Petitioner's argument in his Section III assumes that all controversies are necessarily subject to judicial determination. That simply is not the case. In *Briscoe* v. *Bell*, 432 U. S. 404 (1977), this Court recently held that the United States Attorney General's determination that a state is covered by the Voting Rights Act of 1965, having been declared "final" by Congress, is not subject to judicial review, at least as to the factual basis for such determination. See also *Shaughnessy* v. *United States*,

345 U. S. 206 (1953) (decision by Attorney General to exclude alien on grounds of national security held final and nonreviewable); *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) (Presidential determinations of when a "state of war" has ceased to exist and, in an immediate post-war period, of whether enemy aliens should be deported held final and nonreviewable); *Powell* v. *McCormack*, 395 U. S. 486, 521 n. 42 (1969) (whether federal courts are barred from reviewing factual determination by Congress that one of its members should be expelled based on judicially defined legal criteria held an open question).

In this case, the plurality interpreted the confidentiality provision in Article VI, § 15(c) of the 1970 Illinois Constitution, as a matter of state law, to limit the court's role to defining the general standard to be applied by the Board in deciding what Board materials should be disclosed. Under the plurality interpretation of the Illinois constitution, the application of that standard in individual circumstances has been delegated to the Board on a final and non-reviewable basis.[8] The validity of that distribution of decision-making authority (pursuant to the Illinois Constitution) is no more repugnant to the United States Constitution than are the distributions of decision-making authority considered in the cases referred to in the preceding paragraph. It is no more subject to challenge here than the distribution of subject matter jurisdiction within the Illinois judicial system would be. See *Herb* v. *Pitcairn*, 324 U. S. 117, 121-22 (1945). The Board is, after all, like a court, a public

8. That interpretation of the Illinois constitutional provision, being a matter of state law, is not subject to review here. *Herb* v. *Pitcairn*, 324 U. S. 117 (1945); *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557 (1940). Petitioner's implication (Petition 14-15) that such interpretation is not consistent with the decision in *People ex rel. Harrod* v. *Illinois Courts Commission*, 69 Ill. 2d 445, 372 N. E. 2d 53 (1977), is wholly beside the mark. Petitioner misreads the scope of *Harrod;* but even if there were such inconsistency, reconciliation of the plurality opinion with the decision in *Harrod* is again a matter of state law for determination by the Illinois courts.

body charged with responsibility to perform faithfully its constitutionally-mandated functions.[9]

Petitioner's reference to several authorities discussing the concept of judical review generally (Petition 13-15) is of little aid in resolving the issue in this case. There is no question that courts generally have implied authority to determine whether action taken by a coordinate branch of government is authorized by statute or constitution. But as the cases referred to in this Section V demonstrate, such implication is not the universal rule. It is clearly constitutional to limit judicial review in particular circumstances—and such limitations render the controversy nonjusticiable. The plurality opinion interprets the confidentiality provision in Article VI, § 15(c) of the 1970 Illinois Constitution as establishing just such a limitation: It bars court review of the Board's application of the judicially-defined general standard for disclosure of its confidential materials.

In *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), this Court inquired independently into whether the publication of information regarding confidential judicial disciplinary proceedings constitutes a clear and present danger to the integrity of such proceedings sufficient to justify general prohibition. The plurality opinion has made a similar judicial inquiry: whether the public interest in the confidentiality of Board proceedings is sufficiently compelling to justify an absolute prohibition against their disclosure upon request by a criminal defendant for use in his defense of the criminal proceeding. The plurality has expressed its view that an absolute prohibition is inappropriate. However, the plurality has concluded that only a limited disclosure, within specifically defined parameters, should be made. Thus the judicial balancing of interests is already an accomplished fact under the plurality approach. All that

9. Petitioner's suggestion (Petition 16-17) that the inclusion of four non-lawyers in the Board's nine-person membership somehow affects its ability to make the determination allocated to it under the Illinois constitutional provision does not rise to federal constitutional proportions. See *North* v. *Russell*, 427 U. S. 328 (1976).

remains to be done is for the Board to apply the standard announced.[10]

CONCLUSION

For the foregoing reasons, any one of which should suffice, Respondent respectfully submits that the Petitioner for a writ of certiorari should be denied.

Respectfully submitted,

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10. None of the other cases relied on by Petitioner (Petition 15-16) even purport to establish a federal constitutional right to an *in camera* inspection of confidential materials.